THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.- NORTH JUNE TERM, 2007

STATE OF NEW HAMPSHIRE

V.

MICHAEL ADDISON

No. 07-S-0254

Motion to Bar The Death Penalty (No. 4): The Statute is Unconstitutional Because Its Elimination of the Rules of Evidence Violates Due Process and the Cruel or Unusual Punishments Clause

Michael Addison moves to bar the death penalty.

The death penalty sentencing statute, RSA 630:5, III, is unconstitutional insofar as it provides that the "rules governing admission of evidence at criminal trials" do not apply to capital sentencing hearings. While this provision has been upheld under the federal constitution, it is invalid under the New Hampshire Constitution.

In a separate motion, Motion to Bar The Death Penalty (No. 3), Mr. Addison has addressed the separation of powers concerns implicit in the legislature's decision to eliminate the rules of evidence in capital sentencing jury trials. In this motion, he additionally invokes his state constitutional rights to due process and a fair trial, and against cruel, unusual, or disproportionate punishments. N.H. Const. pt. I, arts. 15, 18, & 33.

As grounds, Mr. Addison states:

1. He is charged with capital murder. The indictment alleges that he knowingly killed Manchester Police Officer Michael Briggs while Officer Briggs was acting in the line of duty.

RSA 630:1, I(a).

2. The State has filed a notice to seek the death penalty if Mr. Addison is convicted. Thus, if the State proves Mr. Addison guilty of capital murder, the jury that heard the trial will consider the issue of punishment. RSA 630:5, II(a). The jury will decide whether to return a sentence of death, or life without parole. RSA 630:5, IV.

3. Based on the statute, and the State's death penalty notice, a jury that convicts Mr. Addison of capital murder would, in the sentencing phase, have to first determine whether he acted purposely (or a variant thereof). See RSA 630:5, IV; VII (a). If so, the jury would consider whether the State proved statutory aggravating factors, see RSA 630:5, I(b); VII (e) & (j), and non-statutory aggravating factors, see RSA 630:5, I(b); IV. Against any aggravating factors the State proved, the jury would consider the existence of mitigating factors, weigh them in light of the aggravating factors, and reach a decision as to the appropriate sentence. See RSA 630:5, III & IV.

4. Thus, the "purposely" determination, proof of aggravating factors, and weighing of aggravating against mitigating factors, all constitute the "sentencing phase" of the capital proceeding.

The Rules of Evidence Do Not Apply in Capital Sentencing[1]

5. The capital sentencing statute contains the following provision regarding the applicability of the rules of evidence to the sentencing phase, including the "purposely" determination mandated under RSA 630:5, VII (a):

> Any other information relevant to such mitigating or aggravating factors may be presented by either the state or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

RSA 630:5, III. Accordingly, except for a modified Rule 403 balancing test, the rules of evidence do not apply to capital sentencing.

6. This provision is identical to 18 U.S.C. §3593(c) of the Federal Death Penalty Act. Its constitutionality has been challenged, and upheld, in federal court. See, e.g., United States v. Fell, 360 F.3d 135 (2d Cir. 2004); Chandler v. Moore, 240 F.3d 907 (11th Cir. 2001); State v. Kleypas, 40 P.3d 139, 248 (Kan. 2001)(upholding challenge under Eighth Amendment).

7. The rationale is essentially three-fold. First, because the rules of evidence are not constitutionally compelled, see Dickerson v. United States, 530 U.S. 428, 437 (2000), their abrogation by Congress is not, per se, unconstitutional. Second, the elimination of the rules of

---

[1]It may be tempting to conclude that Rule of Evidence 1101(a)(3), which excepts the rules from "sentencing," applies to capital sentencing. To the extent it is urged to do so, the Court should not adopt this argument. The rule, which was adopted in 1985, and has been amended in 1991 and 2004, does not reference the capital murder statute. Cf. State v. Nicholas H., 131 N.H. 569, 573 (1989)(holding that rules of evidence applied to juvenile certification hearings, since they were not specifically excepted from Rule 1101). There is no indication that Rule 1101excepts the Rules of Evidence from any jury proceeding. To the contrary, every proceeding enumerated in the rule occurs before a judge, which indicates it does not apply to jury sentencing. Cf. State v. Beckert, 144 N.H. 315, 317-18 (1999)(in light of other terms in statute, hunting knife is "other dangerous weapon"). Moreover, the United States Supreme Court has recognized that in the capital context, a sentencing proceeding is more akin to a jury trial than typical criminal sentencing. See, e.g., Monge v. California, 524 U.S. 721, 731-32 (1998)("[The penalty phase] is in many respects a continuation of the trial on guilt or innocence of capital murder."). Accordingly, Rule 1101 has no bearing on the issue Addison raises.

evidence in capital sentencing has been deemed to facilitate the "individualized sentencing" envisioned by the capital sentencing scheme. Fell, 360 F.3d at 144; accord United States v. Lee, 374 F.3d 637, 648 (8th Cir. 2004). Third, by virtue of the modified Rule 403 clause, and constitutional standards, the trial judge still retains control over the information ultimately presented to the jury. Fell, 360 F.3d at 145; accord United States v. Fulks, 454 F.3d 410, 438 (4th Cir. 2006).

8. The first of these points has been addressed in the related separation of powers motion. In the federal system, "Congress retains the ultimate authority to modify or set aside judicially created rules of evidence or procedures that are not required by the Constitution." Dickerson, 530 U.S. at 437. As that motion makes clear, this is not so in New Hampshire. For that reason alone, the legislature's effort to copy federal law, and abrogate the rules of evidence in capital sentencing, is unconstitutional.

9. Additional concerns support Mr. Addison's argument that the rules of evidence must apply in capital sentencing.

Elimination of the Rules of Evidence in a Capital Sentencing Trial Violates the New Hampshire Constitution

10. In his Motions to Bar The Death Penalty (Nos. 1 & 2), Mr. Addison discussed the enhanced due process, and cruel or unusual punishments, protections afforded an accused under the New Hampshire Constitution. The state due process clause provides greater protection than the federal constitution in both post-conviction relief and sentencing contexts. See, e.g., State v. Laurie, 139 N.H. (discussing burden of proof to secure new trial based on withheld, exculpatory evidence) State v. McLellan, 146 N.H. 108 (2001)(discussing burden of proof where State seeks life without parole for aggravated felonious sexual assault). Further, while the Supreme Court

has not yet expressly so ruled, Mr. Addison has argued, in his first motion, that part I, articles 18 & 33 provide greater protection than the Eighth Amendment.

11. For the purposes of this motion, McLellan is particularly instructive. In McLellan, the State sought a sentence of life without parole for a third aggravated felonious sexual assault conviction. Id. at 113. The defendant argued that, consistent with the due process clause, the State should have been required to prove the existence of the prior, enhancing convictions beyond a reasonable doubt, instead of merely by a preponderance of the evidence. Id. The Supreme Court agreed. In so holding, the Court noted that "[w]ith the exception of the death penalty, life imprisonment without parole is the most severe penalty that may be imposed in this State. . . . The gravity of the potential sentence renders any [ ] possibility [of an erroneous sentence] a significant risk that must be minimized by a heightened burden of proof."[2] Id. at 114.

12. The McLellan Court's language resonates with that of another state supreme court that held unconstitutional, under its state constitution, a death penalty sentencing provision that allowed the jury to consider "any relevant evidence." State v. Bartholomew, 683 P.2d 1079 (Wash. 1984).

13. In Bartholomew, the statutory provision at issue allowed the jury to consider "any relevant evidence which [the court] deems to have probative value regardless of its admissibility under the rules of evidence, including hearsay evidence and evidence of the defendant's previous

[2]Mr. Addison's second motion to bar the death penalty is replete with other examples of enhanced burdens of proof under the New Hampshire Constitution.

criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity." Id. at 1085 (italics omitted)(quoting R.C.W. §10.95.060(3)). The Bartholomew Court held, inter alia, that "the liberal authority . . . to receive "any relevant evidence" must be limited to mitigating evidence only." Id. at 1082. The United States Supreme Court reversed and ordered the court to reconsider its decision in light of Zant v. Stephens, 456 U.S. 410 (1982)[3]. 683 P.2d at 1082. On reconsideration, the Bartholomew Court reached the same conclusion. Id. at 1085.

14. The Bartholomew Court noted that it had, in the past, read into its state constitution greater protection than that available under the Eighth and Fourteenth Amendments. Id. at 1085. In accord, it held "that the due process and cruel punishment provisions of this state's constitution are offended by [capital statutory provisions] allowing the introduction of any evidence regardless of its admissibility under the Rules of Evidence. . . ." Id. In language that mirrors that employed by the McLellan Court, the Bartholomew Court stated:

> Since the death penalty is the ultimate punishment, due process under this state's constitution requires stringent procedural safeguards so that a fundamentally fair proceeding is provided. . . . We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability. The rules of this court concerning the admissibility of evidence are premised on allowing evidence which is trustworthy, reliable, and not unreasonably prejudicial. . . . It makes no sense to afford these protections to one charged with a lesser crime but then suspend them in a capital case. We will not do so, for this would place a defendant facing the death penalty in the perilous position of having to rebut potentially unreliable or unreasonably prejudicial evidence before a jury that has already convicted him of aggravated murder. To suspend these protections which are afforded all other criminally charged defendants at such a critical phase of a capital case is contrary to the reliability of evidence standard embodied in the due process clause of our state constitution.

[3]In Zant, the Supreme Court remanded to the state court the issue of whether the invalidation of one of three aggravating circumstances on appeal mandated a new sentencing hearing.

Id. at 1085-86. See also, State v. Clark, 24 P.3d 1006, 1030 (Wash. 2001)(quoting, with approval, a portion of the above-excerpted section of Bartholomew). As a result, "the liberal authority . . . to receive "any relevant evidence must be limited to mitigating evidence only. . . . The admission of evidence of aggravating factors and consideration by the jury of aggravating factors must be restricted to meet the evidentiary, and state and federal constitutional standards we have articulated." Bartholomew, 682 P.2d at 1086-87.

15. The New Hampshire statute is arguably superior to Washington's, in that it at least contains a modified Rule 403 limitation on the admission of relevant evidence. However, like Washington's, it allows other evidence that, while not necessarily prejudicial in a Rule 403 sense, is nonetheless unreliable, such as hearsay, character evidence, opinion evidence, evidence that lacks a proper foundation for admissibility, and evidence that is not properly authenticated. Like Washington's, our Supreme Court has a tradition of affording the greatest due process-related protections where the stakes are the highest, and the risk associated with an erroneous deprivation of liberty is the most acute. See McLellan, 146 N.H. at 115 ("The analysis of these three [due process] factors supports our conclusion that the Due Process Clause of the New Hampshire Constitution requires proof beyond a reasonable doubt of prior convictions used to enhance a defendant's sentence to life without parole. . . ."); see also, In re Shelby R., 148 N.H. 237, 243 (2002)(under three-part due process test, indigent stepparent facing abuse and neglect has right to appointed counsel. This Court should rule that RSA 630:5, III, insofar as it abrogates the rules of evidence in capital sentencing proceedings, is unconstitutional.

The Legislature Cannot Eliminate Rule 404(b)

16. Even if the legislature can abrogate the rules of evidence, it cannot abrogate Rule

404(b). Thus, RSA 630:5, III is unconstitutional to the extent it purports to render Rule 404(b) inapplicable to capital sentencing.

17. The Supreme Court has already ruled that the legislature cannot effectively revoke Rule 404(b) as it applies to sexual assault cases. Opinion of the Justices, 141 N.H. 562 (1997)("O.J."). In his Motion to Bar The Death Penalty (No. 3), Mr. Addison has focused on the separation of powers-based rationale for this ruling. However, the O.J. Court was equally concerned with due process.

> Rule 404(b) is a prime example of an internal procedural rule designed to effectuate a constitutional right. The purpose of Rule 404(b) in a criminal trial is to increase the probability of a just verdict. . . . A just verdict is the result of a fair trial, the right to which is a substantive right grounded in our constitution, not in statutory enactments.

Id. at 574.

18. Given that Rule 404(b) implements constitutional guarantees, and a capital sentencing hearing is tantamount to a criminal trial, the legislature cannot override the rule in this context any more than it could have in the context analyzed by the O.J. Court. Accordingly, to the extent that RSA 630:5, III purports to apply to the role of Rule 404(b) in capital sentencing, it is unconstitutional.

The Rules Must Apply to the "Purposely" Determination

19. Under the capital sentencing statute, if Mr. Addison is convicted of capital murder, the jury must determine whether he acted "purposely," or some variant thereof. RSA 630:5, VII (a). By design, the rules of evidence do not govern this determination.

20. Presumably, "purposely," as used here, has the same meaning as it does in RSA 626:2, II(a). Accordingly, in RSA 630:5, III, the legislature has determined that the State can prove Mr. Addison acted "purposely" based on evidence that was not competent to demonstrate,

in the guilt phase, that he acted "knowingly."

21. To illustrate, if the State sought to prove Mr. Addison's guilt of capital murder, it could not call a witness who offered an opinion on Mr. Addison's ability to form a culpable mental state at the time Officer Briggs was shot. See State v. St. Laurent, 138 N.H. 492, 495 (1994)("We conclude that the testimony of an expert psychologist on the ultimate issue of whether the defendant was capable of forming the requisite intent for the crimes charged will not aid the jury in its search for the truth."). At the sentencing phase, however, it could put on evidence that the Court has deemed unreliable to prove a factor – the "purposely" aggravator – every bit as critical as the mental state underlying capital murder.

22. Any other time the State must prove an accused acted "purposely" in order to seek punishment, the rules of evidence apply. This is true even if the maximum available punishment for the underlying offense is a year in the house of corrections. The Supreme Court has held that the State may rely on circumstantial evidence, but it has never held the evidence used to prove someone acted purposely can be unreliable. To the contrary, the Court has touted the value of the rules in ensuring reliable results. See, e.g., State v. Lowe, 140 N.H. 271, 278 (1995)(noting that hearsay exception "help[s] insure a fair trial")(Johnson, J., and Brock, C.J., dissenting); State v. Newcomb, 140 N.H. 72, 79-80 (1995)(parties "'must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'")(quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973)). Accordingly, if the rules do not apply to the "purposely" determination, the statute violates due process, the right to a fair trial, and the right to be protected against punishments that are cruel or unusual.

WHEREFORE, Mr. Addison respectfully requests that this Honorable Court:

a. Rule that RSA 630:5, III is unconstitutional because it states that the rules of evidence do not apply in capital sentencing proceedings; or, in the alternative,

b. Certify the question raised by this motion to the Supreme Court for its interlocutory consideration.

Respectfully submitted,

David Rothstein, Public Defender
Franklin Pierce Law Center
2 White Street
Concord, NH 03301
(603) 228-9218

Richard Guerriero, Public Defender
N.H. Public Defender
117 North State Street
Concord, NH 03301
(603) 224-1236

Donna Brown, Public Defender
N.H. Public Defender
117 North State Street
Concord, NH 03301
(603) 224-1236

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been forwarded this 22nd day of June, 2007, to the Office of the Attorney General.

David Rothstein, Public Defender

HILLSBOROUGH COUNTY

2007 JUN 22 P 1:57